Matthew A. Brill
Direct Dial: +1.202.637.1095
matthew.brill@lw.com

555 Eleventh Street, N.W., Suite 1000
Washington, D.C. 20004-1304
Tel: +1.202.637.2200 Fax: +1.202.637.2201
www.lw.com

LATHAM & WATKINS LLP

June 4, 2013

Ms. Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, D.C. 20554

Re: Notification of Ex Parte Presentations of Anda, Inc., Regarding Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent, CG Docket No. 05-338 (filed Nov. 30, 2010)

Dear Ms. Dortch:

On May 31, 2013, the undersigned and Matthew Murchison of Latham & Watkins LLP, representing Anda, Inc. ("Anda"), met with Priscilla Delgado Argeris in the Office of Commissioner Rosenworcel and Matthew Berry, Nicholas Degani, and Joshua Cox in the Office of Commissioner Pai to discuss Anda's Petition for Declaratory Ruling and Application for Review in the above-referenced docket.

At both meetings, we argued that the Commission should issue an order clarifying that Section 64.1200(a)(3)(iv) of its rules,[1] which provides that commercial faxes sent with the prior express consent of the recipient must contain the same opt-out notice that appears on unsolicited fax advertisements, was not prescribed under Section 227(b) of the Communications Act. Anda requested such a ruling in its November 2010 Petition for Declaratory Ruling, but the Consumer and Governmental Affairs Bureau issued an Order nearly a year and a half later summarily dismissing the Petition.[2] We pointed out that the Bureau did so without seeking public comment, without resolving the substantive issues raised in the Petition, and in a manner that prevents

---

1 47 C.F.R. § 64.1200(a)(3)(iv).

2 *See Junk Fax Prevention Act; Petition for Declaratory Ruling to Clarify That 47 U.S.C. § 227(b) Was Not the Statutory Basis for Commission's Rule Requiring an Opt-Out Notice for Fax Advertisements Sent with Recipient's Prior Express Consent*, Order, 27 FCC Rcd 4912 (CGB 2012).

Anda from seeking judicial review or defending itself from unwarranted liability in pending class actions.

In particular, we explained that if the Commission does not clarify that Section 64.1200(a)(3)(iv) was adopted pursuant to authority other than Section 227(b), class action lawsuits alleging technical violations of that rule will continue to threaten legitimate businesses with massive unwarranted liability based solely on consensual communications with their customers.[3] By jeopardizing Anda's continued viability (not to mention the viability of other senders of solicited, business-to-business fax communications facing similar litigation risks), these lawsuits also endanger the tens of thousands of pharmacies—many of which cannot afford to keep significant amounts of generic pharmaceuticals in stock—that rely on Anda to fill orders of any size on short notice.

In support of Anda's Application for Review and Petition for Declaratory Ruling, we argued that Section 227(b) of the Act, which imposes various restrictions on senders of *unsolicited* faxes, could not have been the statutory basis for Section 64.1200(a)(3)(iv), as the rule regulates a class of communications (*solicited* faxes) that Section 227 does not purport to regulate *at all*. We explained that not only does a straightforward reading of Section 227(b) support Anda's position, but a contrary ruling would run afoul of the First Amendment. Construing the statute to require senders of solicited faxes to include a mandatory opt-out notice and to expose such entities to unlimited liability for any failures to comply would raise grave constitutional concerns, because (1) there is no legitimate governmental interest in interfering with consensual communications between businesses and customers that expressly request information via fax, and (2) allowing class action lawsuits that could result in damages amounting to hundreds of millions of dollars for companies such as Anda that engaged in such consensual communications would severely burden speech in a manner that is grossly disproportionate to whatever interest assertedly underlies the rule.

We noted that courts have upheld Section 227's requirements for *unsolicited* faxes against First Amendment challenges based on the finding that the government has a "substantial interest in . . . prevent[ing] the cost shifting and interference such *unwanted* advertising places on the recipient," and because advertisers remained free to "obtain consent for their faxes."[4] As Anda explained in its Petition for Declaratory Ruling and in the pending Application for Review, these justifications vanish where, as here, the recipient *has* provided express consent to receive

---

3 As Judge Posner has recognized, Section 227 of the Act imposes "potentially very heavy penalties on its violators—many of whom ... have never heard of this obscure statute," and can expose them to "bet-your-company" class actions resulting in coercive settlements. *Creative Montessori Learning Ctrs. v. Ashford Gear LLC*, 662 F.3d 913, 915-16 (7th Cir. 2011).

4 *Missouri v. AM Blast Fax*, 323 F.3d 649, 655, 659 (8th Cir. 2003) (emphasis added); *see also Destination Ventures v. FCC*, 46 F.3d 54, 56, 57 (9th Cir. 1995) (articulating "the government's substantial interest in preventing the shifting of advertising costs to consumers" and finding that "*unsolicited* fax advertisements shift significant advertising costs to consumers") (emphasis added).

information via fax. We also distinguished cases upholding disclosure requirements under a lower level of scrutiny, such as the Supreme Court's decision in *Zauderer*,[5] on the grounds that (1) unlike disclosures intended to prevent deceptive speech or similarly harmful omissions, there is no substantial governmental interest in compelling businesses to provide detailed opt-out instructions to customers who expressly elected to receive information by fax, and (2) the massive liability associated with authorizing class actions to recover automatic damages for each solicited fax sent without a compliant opt-out notice imposes far greater burdens on speech than garden-variety disclosure obligations. Consistent with these distinctions, the D.C. Circuit has held that the lenient standard of review applied in *Zauderer* has no application unless the government affirmatively demonstrates that an advertisement threatens to deceive consumers.[6] The Commission has never claimed that failing to send an opt-out notice to consumers who expressly opted-in to receiving faxes could be deceptive, much less that it extended the opt-out notice rule to solicited faxes to combat any such deception. Indeed, the adopting order failed to provide any rationale at all for that extension,[7] and even included the contradictory (and ultimately incorrect) statement that "the opt-out notice requirements *only* applies to communications that constitute *unsolicited* advertisements."[8] Therefore, there is no question that construing Section 227 in a manner that subjects solicited fax communications to a mandatory opt-out notice rule—particularly one backed by a private right of action that exposes senders of faxes to crippling liability—would be subject to intermediate scrutiny at the very least.

Although Anda's Petition for Declaratory Ruling and Application for Review focus on obtaining a ruling that 64.1200(a)(3)(iv) of the Commission's rules was not prescribed under Section 227(b) of the Act (and therefore does not give rise to a private right of action under Section 227(b)(3)), we noted that, if the Commission determines that the rule also could not have been validly adopted pursuant to Section 4(i) or 303(r) of the Act, it should declare that, on reflection, the rule was *ultra vires* when adopted and cannot be enforced by the courts or the Commission. We noted that the Commission on its own initiative has invalidated certain obligations as inconsistent with the First Amendment, such as when it abandoned the Fairness Doctrine,[9] and there is no reason it cannot do so here.

---

5 *Zauderer v. Office of Disciplinary Counsel of Supreme Court*, 471 U.S. 626 (1985).

6 *R.J. Reynolds Tobacco v. FDA*, 696 F.3d 1205, 1213-14 (D.C. Cir. 2012).

7 *Rules and Regulations Implementing the Telephone Consumer Protection Act of 1991; Junk Fax Prevention Act of 2005*, Report and Order and Third Order on Reconsideration, 21 FCC Rcd 3787 ¶ 48 (2006) ("*JFPA Order*") (stating without any explanation that "entities that send facsimile advertisements to consumers from whom they obtained permission, must include on the advertisements their opt-out notice").

8 *Id.* ¶ 42 n.154 (emphasis added).

9 *Inquiry into Alternatives to the General Fairness Obligations of Broadcast Licensees*, Report, 102 FCC 2d 145 (1985), *aff'd, Syracuse Peace Council v. FCC*, 867 F.2d 654 (D.C. Cir. 1989).

Regardless of how the Commission ultimately views the merits of Anda's Petition for Declaratory Ruling and Application for Review, we emphasized that it would be not only grossly unfair but plainly unlawful to sidestep the merits of the statutory authority question presented by Anda. In these circumstances, the Commission has a clear duty to state whether 64.1200(a)(3)(iv) of its rules was prescribed under Section 227(b); it cannot simply dismiss Anda's Petition for Declaratory Ruling as supposedly presenting an insubstantial question that requires no answer, as the Bureau Order attempted to do. A pivotal consideration here is that the Commission has vigorously defended the proposition that, in light of the Hobbs Act, *it alone* may determine whether Section 64.1200(a)(3)(iv) was prescribed under authority other than Section 227(b) or is *ultra vires*—and that Anda and similarly situated class action defendants accordingly may not raise statutory or constitutional defenses against private actions seeking to enforce the rule based on failures to include opt-out notices on solicited faxes. In light of that position, the Commission cannot refuse to respond substantively to Anda's arguments.

In a recent proceeding before the U.S. Court of Appeals for the Eighth Circuit, the Commission filed two *amicus* briefs seeking reversal of a district court's dismissal of such a lawsuit alleging violations of Section 64.1200(a)(3)(iv). The Commission's first brief argued that (1) notwithstanding contrary language included in the *JFPA Order*, Section 64.1200(a)(3)(iv) requires opt-out notices on faxes sent with the recipient's express consent, and (2) a civil defendant is barred from challenging Section 64.1200(a)(3)(iv) as *ultra vires* or unconstitutional.[10] Anda later obtained leave to file an *amicus* brief, in which it argued that the court should examine whether Section 64.1200(a)(3)(iv) was prescribed under Section 227(b) of the Act, as it would otherwise lack subject matter jurisdiction over a damages action under Section 227(b)(3); Anda further argued that, to the extent the court found that the Commission promulgated the rule pursuant to Section 227(b), Sections 703 and 704 of the Administrative Procedure Act create an exception to the Hobbs Act and provide a basis for invalidating the rule as *ultra vires*.[11]

The Commission then sought and obtained leave to file a response to Anda's brief. That supplemental *amicus* brief argued that direct review of the 2006 *JFPA Order* under the Hobbs Act provided an adequate judicial remedy some seven years ago, and that Anda and other civil defendants still could pursue relief before the Commission in lieu of raising defenses in a class action proceeding.[12] Notably, the Commission's supplemental brief acknowledged that Anda had sought a declaratory ruling and argued that the Bureau's dismissal of that petition did not "show that the Hobbs Act remedies" available in 2006 were inadequate, because the full

---

10 Amicus Br. for the Federal Communications Commission Urging Reversal, *Nack v. Walburg*, No. 11-1460 (8th Cir. Feb. 24, 2012) ("Initial FCC Amicus Brief").

11 Amicus Br. of Anda, Inc. in Support of Appellee at 11, *Nack v. Walburg*, No. 11-1460 (8th Cir. Jul. 20, 2012).

12 Supplemental Amicus Brief for the Federal Communications Commission Urging Reversal, *Nack v. Walburg*, No. 11-1460 (8th Cir. Aug. 21, 2012) ("Supplemental FCC Amicus Brief").

Commission had yet to act on Anda's Application for Review and the ultimate disposition of the statutory authority underlying Section 64.1200(a)(3)(iv) therefore remained unresolved.[13]

The Eighth Circuit issued an opinion on May 21, 2013, agreeing with the Commission that, in light of the Hobbs Act, the court could not adjudicate whether Section 64.1200(a)(3)(iv) is *ultra vires*.[14] The court further held that similar considerations precluded it from deciding whether Section 64.1200(a)(3)(iv) was prescribed under authority other than Section 227(b) of the Act, and in turn whether the private right of action in Section 227(b)(3) applies to violations of the rule. The court appeared troubled by this outcome, deeming it "questionable whether the regulation at issue … properly could have been promulgated under the statutory section that authorizes a private cause of action."[15] Nevertheless, the court declined to resolve whether a private right of action could properly be maintained based on the transmission of a solicited fax without a compliant opt-out notice, finding that a challenge to the scope of the private right of action "involves the same need for deference to the agency and nationally uniform determinations as a direct, Hobbs Act challenge."[16]

Accordingly, now that the Commission urged the Eighth Circuit *not* to resolve the scope of the private right of action based on the assertion that only the agency may do so, and the court has agreed, it would be the height of arbitrariness and bad faith to refuse to address that question squarely on the merits in response to Anda's longstanding petition. As an initial matter, the court's explicit statement that it would be "questionable" to conclude that Section 64.1200(a)(3)(iv) was validly prescribed under Section 227(b) necessarily would make it arbitrary and capricious for the Commission to endorse the Bureau's prior conclusion that Anda failed to identify any legitimate uncertainty or controversy that requires resolution. Moreover, after highlighting Anda's opportunity to obtain meaningful relief through its Application for Review as a basis for rejecting the availability of collateral review under Sections 703 and 704 of the APA,[17] turning around and refusing to address the merits of Anda's arguments regarding the

---

13 *Id.* at 12 n.8.

14 *Nack v. Walburg*, No. 11-1460, slip op. at 8-10, 2013 WL 2157822 at *4-5 (8th Cir. May 21, 2013).

15 *Id.*, slip op. at 2, 2013 WL 2157822 at *1,; *see also id.*, slip op. at 7, 2013 WL 2157822 at *4 (again acknowledging "concerns regarding the validity of 47 C.F.R. § 64.1200(a)(3)(iv) [and] the scope of the private right of action"). The court also made clear that its prior rulings upholding restrictions on unsolicited faxes as consistent with the First Amendment "would not necessarily be the same if applied to the agency's extension of authority over solicited advertisements." *Id.*, slip op. at 12, 2013 WL 2157822 at *6.

16 *Id.*, slip op. at 11, 2013 WL 2157822 at *6.

17 Supplemental FCC Amicus Brief at 12 n.8.

scope of the private right of action would amount to a shell game.[18] The D.C. Circuit has made clear in analogous contexts that agency efforts to evade judicial review will not be tolerated.[19]

The arbitrary and capricious nature of any refusal to respond to Anda's arguments would be compounded by the Commission's own recognition that if it took enforcement action against Anda for an alleged violation of Section 64.1200(a)(3)(iv), Anda would be free in that event to challenge the substantive validity of the rule under the *Functional Music* doctrine.[20] There is no sound reason why a company that sent faxes to customers with their express consent but without a compliant opt-out notice may raise appropriate statutory and constitutional defenses in enforcement proceedings initiated by the Commission, but the same company facing comparable enforcement actions initiated by a private litigant should be altogether barred from defending itself. To the contrary, the far greater exposure entailed by a putative class action heightens the need to be able to assert appropriate defenses against a rule that does not implicate the private right of action or is *ultra vires*. Notably, a federal court has ruled that damages should be aggregated on a class-wide basis, where consent is not a defense and where the key issue is whether the advertisements contained conforming opt-out notices. *See Vandervort v. Balboa Capital Corporation*, 287 F.R.D. 554, 562 (C.D. Cal. 2012) (class certification granted because "the inquiry will be limited to the opt-out notice on the faxes, the trial will not require determining whether each class member consented to receiving fax"). And, again, given the Commission's on-the-record view that Anda is *not* barred from defending itself—but rather must assert its statutory and constitutional arguments before the Commission rather than in defending against class actions in court—the Commission cannot legitimately refuse to address those arguments on the merits. Were the Commission to do so, its action not only would be arbitrary and capricious but could demonstrate that Anda lacks any avenue for meaningful judicial review of those statutory and constitutional arguments, thus triggering the Hobbs Act exception in

---

18 The Commission's repeated references to Anda's opportunity file a petition for rulemaking seeking to repeal Section 64.1200(a)(3)(iv) *prospectively* in no way diminish Anda's right to seek *retrospective* relief regarding (1) the legal status of that rule from its adoption in 2006 through the present and (2) whether violations of the rule during that period gave rise to private rights of action. Section 1.2 of the Commission's rules expressly authorizes such petitions for declaratory ruling, and there is no authority for the proposition that Anda was entitled to seek only a prospective rule change. To the contrary, parties routinely seek declaratory rulings regarding the intersection between Commission rules and private rights of action, and the Commission frequently grants such requests. *See, e.g., Petition for Declaratory Ruling Regarding Negative Option Billing Restrictions of Section 623(f) of the Communications Act and the FCC's Rules and Policies*, Declaratory Ruling, 26 FCC Rcd 2511 (MB 2011) (issuing declaratory ruling on negative option billing by cable operators that extinguished potential class action liability).

19 *See, e.g., In re Aiken Cnty.*, 645 F.3d 428, 436 (D.C. Cir. 2011) (recognizing that an agency's efforts to "insulate itself from judicial review by refusing to act" warrant mandamus relief).

20 Initial FCC Amicus Brief at 22.

Sections 703 and 704 of the APA. Notably, the Eighth Circuit expressly withheld judgment on whether the Commission's refusal to act on an administrative petition would have that consequence.[21] Accordingly, whereas addressing the merits of Anda's argument would merely force the agency to mount a routine defense of its statutory and constitutional analysis before the court of appeals, sidestepping the merits would have the ironic result of forcing Anda to invoke (and running the risk that a court would recognize) the very opportunity for collateral attacks on Commission rules that the Commission ardently opposed before the Eighth Circuit.

For all these reasons, we urged the Commission representatives with whom we met to ensure that the order addressing Anda's Application for Review squarely resolves the questions presented on the merits, thus enabling direct review of any adverse determinations. Any effort to thwart judicial supervision by refusing to provide a conclusive merits-based response would be arbitrary and capricious and might well trigger a right of collateral review in a federal district or appellate court.

Please contact the undersigned if you have any questions regarding these issues.

Sincerely,

/s/ Matthew A. Brill

Matthew A. Brill
Counsel for Anda, Inc.

cc: Priscilla Delgado Argeris
Matthew Berry
Nicholas Degani
Rebekah Goodheart

---

[21] *Nack v. Walburg*, slip op. at 10 n.2, 2013 WL 2157822 at *5 n.2.